No. 98 – 1285

Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

–v.–

MARILYN J. BARTLETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAW OFFICE OF JO ANNE SIMON
*Jo Anne Simon, of Counsel**
356 Fulton Street, 3rd Floor
Brooklyn, New York 11201
(718) 852-3528

NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.
Ruth Lowenkron, of Counsel
30 WEST 21ST Street, 9th Floor
New York, New York 10010
(212) 727-2270

Attorneys for Respondent

* *Counsel of Record*

25pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 3

I. *The Second Circuit's Determination that Dr. Bartlett is a Person with a Disability under the Americans with Disabilities Act is Consistent with the Language and Purpose of the Act, and the Basis for the Decision Presents No Conflict Among the Circuits* 3

II. *The Second Circuit's Determination Regarding Compensatory Damages is Consistent with Supreme Court and Circuit Court Precedents* ... 9

III. *The Second Circuit's Determination Regarding the Applicability of Section 504 of the Rehabilitation Act is Consistent with Supreme Court and Circuit Court Precedents* 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page**

Albertson's, Inc. v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999)(No. 98-591) 7, 8

Alexander v. Choate, 469 U.S. 287 (1985) 11

Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) .. 17

Bragdon v. Abbott, 118 S. Ct. 2196 (1998) 6, 8

Canutillo Independent School District v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997) 9

Carter v. Orleans Parish Public Schools, 725 F.2d 261 (5th Cir. 1984) 10

Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998) 9, 10, 11

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 10, 11

Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998) 9, 10, 11, 12

Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103 (9th Cir. 1987) 11

Grove City College v. Bell, 465 U.S. 555 (1984) 9, 16

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983) 9, 10

J.L. v. Social Security Administration, 971 F.2d 260 (9th Cir. 1992) 11

Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1996) 11, 17

Murphy v. United Parcel Service, 141 F.3d 1185 (10th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999)(No. 97-1992) 6, 8

National Collegiate Athletic Association v. Smith, __ U.S. __, 1999 U.S. LEXIS 1511 (1999) 18

Oxford House-C. v. City of St. Louis, 843 F.Supp. 1556 (E.D. Mo. 1994) 11

Pandazides v. Virginia Bd. of Education, 13 F.3d 823 (4th Cir. 1994) 11

Rosenthal v. New York State Board of Law Examiners, 92 Civ. 1100 (S.D.N.Y. 1992) 14

Ross v. Moffitt, 417 U.S. 600 (1974) 13

Schroeder v. City of Chicago, 927 F.2d 957 (7th Cir. 1991) 17

Sutton v. United Air Lines, 130 F.3d 893
(10th Cir. 1997), cert. granted, __ U.S. __
(January 8, 1999)(No. 97-1943) 6, 8

Thomlison v. City of Omaha, 63 F.3d 786
(8th Cir. 1995) 17

Tyler v. City of Manhattan, 118 F.3d 1400
(10th Cir. 1997) 11

U.S. v. Baylor University Medical Center,
564 F. Supp. 1495 (D. Tx. 1983), aff'd,
modified and vacated in part on other grounds,
736 F.2d 1039 (5th Cir. 1984), cert. denied,
469 U.S. 1189 (1985) 17

U.S. Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 15, 17, 18

Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) 10

Statutes

20 U.S.C. § 1681, et seq. 9
29 U.S.C. § 794 ..... passim
42 U.S.C. § 1983 12
42 U.S.C. § 2000d, et seq. 9
42 U.S.C. § 12111(8) 8
42 U.S.C. § 12111(9) 8
42 U.S.C. § 12111(10) 8
42 U.S.C. § 12112(a) 8

42 U.S.C. § 12131, et seq. ..... passim
42 U.S.C. § 12133 9

Regulations

28 C.F.R. § 35.104 App. A 4
29 C.F.R. § 1630.2(j)(1) 4
34 C.F.R. § 104.3(f) 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-1285

NEW YORK STATE BOARD OF LAW EXAMINERS; JAMES T. FULLER; JOHN E. HOLT-HARRIS, JR.; RICHARD J. BARTLETT; LAURA TAYLOR SWAIN; CHARLES T. BEECHING, JR.; and IRA P. SLOANE,

Petitioners,

–v–

MARILYN J. BARTLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Marilyn J. Bartlett ("Dr. Bartlett") respectfully requests that this Court deny the Petition for a Writ of Certiorari of Petitioners New York State Board of Law Examiners ("the Board"), James T. Fuller, John E. Holt-Harris, Jr., Richard J. Bartlett, Laura Taylor Swain, Charles T. Beeching, Jr. and Ira P. Sloane (collectively, "Petitioners").

STATEMENT OF FACTS

Dr. Bartlett respectfully incorporates by reference the facts set forth in the decision of the Court of Appeals for the Second Circuit. Pet. App. at 1a-22a[1].

SUMMARY OF ARGUMENT

In a ruling not in dispute with any of the circuit courts, the Second Circuit correctly held that Dr. Bartlett is a person with a learning disability pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. ("the ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Petitioners wrongly compare the case at bar with cases involving radically different fact patterns and legal holdings. No circuit courts besides the Second Circuit in this case have considered the issue of learning disabilities. Similarly, no circuit courts other than the Second Circuit have considered the issue of reasonable accommodations for persons with disabilities on licensing examinations. Moreover, those courts which have held that individuals perform major life activities in a "condition, manner or duration" different from the "condition, manner or duration" of the average person have held, as did the Second Circuit herein, that those individuals have disabilities pursuant to the ADA. The cases which Petitioners rely upon to show a split in the circuits found individuals not to have a disability if "mitigating measures" were considered. These cases are inapposite to the basis of the decision because, as the Second Circuit concluded, Dr. Bartlett continues to perform in a condition, manner and duration

---

[1] "Pet." refers to Petitioners' petition for certiorari, and "Pet. App." refers to the petition's appendix.

different from the average person, i.e. continues to have a disability, whether or not "mitigating measures" are considered.

In addition, the Second Circuit, following Supreme Court and circuit court precedent, correctly ruled that Petitioners had intentionally denied Dr. Bartlett's request for the reasonable accommodation of extra time in taking the New York State bar examination. Dr. Bartlett was therefore correctly awarded compensatory damages of no more than $10,000, and possibly less after remand.

The Second Circuit, following Supreme Court and circuit court precedent, determined that the New York State Board of Law Examiners was clearly a recipient of federal monies for purposes of Section 504 liability.

The Second Circuit opinion is not in conflict with any Supreme Court or circuit court cases, and Petitioners do not present any other grounds for granting the petition. The petition should therefore be denied.

REASONS FOR DENYING THE WRIT

I. *The Second Circuit's Determination that Dr. Bartlett is a Person with a Disability under the Americans with Disabilities Act is Consistent with the Language and Purpose of the Act, and the Basis for the Decision Presents No Conflict Among the Circuits*

Petitioners correctly recognize that a "disability" under the ADA exists where an impairment causes an individual to be "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life

activity as compared to the condition, manner or duration under which the average person . . . can perform that same major life actvity." 29 C.F.R. § 1630.2(j)(1)(1997). See Pet. at 11. See also 28 C.F.R. § 35.104 App. A at 470. However, Petitioners wrongly argue that Dr. Bartlett is not so restricted. Petitioners state that Dr. Bartlett can "read at a speed and in a manner comparable to that of an average person. . ." Pet. at 11. Unfortunately for Dr. Bartlett, as the Second Circuit concluded, nothing could be farther from the truth.

The Second Circuit held that "Dr. Bartlett suffers from a lack of automaticity and a phonological processing defect that significantly restricts her ability to identify timely and decode the written word, that is, to read as compared to the manner and conditions under which the average person in the general population can read or learn." Pet. App. at 15a (emphasis added). In addition, the Second Circuit cited to the District Court to conclude that "Dr. Bartlett's low 'test scores on the Woodcock, combined with clinical observations of her [slow and halting] manner of reading amply support a conclusion that she has an automaticity and a reading rate problem.' [citation omitted]." Pet. App. at 7a.[2]

The Second Circuit's conclusion was based on the District Court's finding that Dr. Bartlett "simply [did] not read in the manner of an average person." Pet. App. at 26a. Dr. Bartlett read in a slow and labored manner, Pet. App. at 43a, 51a, stumbled, re-read and self-corrected by relying on contextual

---

[2] Despite Petitioners' mischaracterization, Pet. at 5, the District Court found Dr. Bartlett to be a person with a learning disability: "[t]he evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit . . ." Pet. App. at 24a.

clues. Pet. App. at 44a, 45a. Dr. Bartlett demonstrated a reading rate at the fourth percentile (slower than 96% of college freshmen) when trying to pick up her pace, and at the first percentile (slower than 99% of college freshmen) when reading at her normal pace. Pet. App. at 47a, 50a[3]. Dr. Bartlett has decoding scores at the level of a fourth grade student, Pet. App. at 45a, a Verbal-Performance I.Q. discrepancy which is present in less that 20% of the population, an aptitude-achievement discrepancy present in less than 5% of the population, below average spelling scores, neuropsychological findings suggestive of central nervous system dysfunction, Pet. App. at 49a, including abnormally poor ability to copy figures accurately, Pet. App. at 48a, abnormally poor visual scanning, abnormally slow speed of visual tracking and equivocal laterality (developmentally below that expected of a normal 8 year old), Pet. App. at 48a, difficulty organizing visual-spatial information and difficulty with sequential processing. Pet. App. at 41a, 42a.

Notably, this description of Dr. Bartlett's disability takes into account many of Dr. Bartlett's numerous "self-accommodating techniques." As Dr. Bartlett's experts, Dr. Rosa A. Hagin and Dr. Richard F. Heath, testified at trial, as the District Court found and as the Second Circuit affirmed, while Dr. Bartlett reads, she follows the text with the finger of one hand while moving a finger of her other hand down the left margin to avoid skipping lines. Pet. App. at 44a, 49a, 51a, 54a.

---

[3] Despite Petitioners' misleading statements, Pet. at 5, the District Court did not find, nor did Dr. Bartlett demonstrate at any time, that her reading rate was "average." It is, by any calculation, substantially below average. Dr. Bartlett simply cannot read automatically and thus must read slowly and deliberately in order to read accurately. Pet. App. at 7a.

In addition, she uses "subvocalization" or "verbal rehearsal" when she reads, sometimes mispronouncing words numerous times under her breath before reaching the correct pronunciation. Pet. App. at 45a, 49a, 51a[4].

Thus, the cases to which Petitioners cite to show conflict in the circuits regarding whether or not "mitigating measures" should be taken into account when assessing a disability are wholly inapposite. The plaintiffs in those cases -- Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1997), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1943); and Murphy v. United Parcel Service, 141 F.3d 1185 (10th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 97-1992) -- were found not to have a disability if "mitigating measures" were considered. The eyeglasses of the Sutton plaintiffs and the hypertension medication of the Murphy plaintiff made those

---

[4] The record demonstrates that throughout her life, Dr. Bartlett also relied on such "self-accommodations" as arranging with friends and family to read her texts to her, District Court Transcript ("Tr.") at 832, Second Circuit Joint Appendix ("JA") at 406-7, 418-9, using an index card with a rectangular hole cut in it to stop her eyes from jumping from one line of text to another mid-sentence, JA at 418, 289, 296, and taking "paper" courses to avoid timed tests wherever possible. JA at 406-7, 409. She also relied on personal attributes such as determination, creativity and perseverance to lessen the effects of her disability as much as possible. As this Court recognized, such "self-accommodations" do not obviate the disability. Bragdon v. Abbott, 118 S. Ct. 2196, 2206 (1998) ("In the end, the disability definition does not turn on personal choice.")

In addition, the Woodcock test which is untimed and which Petitioners used to assess Dr. Bartlett's disability, effectively provided Dr. Bartlett with the necessary accommodation of extra time. It is therefore incapable of measuring her disability or her need for the requested accommodation of extended time.

plaintiffs "normal" – i.e. just like the average person. For Dr. Bartlett, none of her self-accommodations eliminate or cure her disabling condition or permit her to read, write or learn in the same condition, manner or duration as adults without this disability. No medication will permit Dr. Bartlett to read at an average rate or like the average person. No eyeglasses or other device will permit her to read at an average rate or like the average person.

The issue of "mitigating measures" is thus irrelevant to the basis of the Second Circuit opinion because with or without "mitigating measures," Dr. Bartlett reads, writes and learns in a different condition, manner and duration than the average person. The Second Circuit was thus correct to conclude that Dr. Bartlett's "history of self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population, 'do not take [her] outside of the protective provisions of the ADA,' [cite omitted], especially where, as here, the dispositive measure [used to deny her request for extra time on the bar examination] is the Woodcock, a test that allowed her unlimited time to compensate for her disability, and a test that cannot measure automaticity directly." Pet. App. at 16a[5].

---

[5] Dr. Bartlett's circumstances also differ from those of the plaintiff in another case to which this Court also recently granted certiorari, Albertson's, Inc. v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), cert. granted, __ U.S. __ (January 8, 1999) (No. 98-591). In that case, the Ninth Circuit held that the plaintiff, a person with essentially monocular vision, was protected by the ADA. Kirkingburg's vision in his one good eye is normal. His brain's "subconscious adjustments" assist him in perception and peripheral vision, so that he qualified for the U.S. Department of Transportation's vision waiver without the assistance of any mechanisms or devices. 143 F.3d at 1231-2. Dr. Bartlett's brain has not performed

The Second Circuit opinion is also in keeping with the most recent articulation by this Court of the definition of disability. In Bragdon v. Abbott, 118 S. Ct. 2196 (1998), this Court pronounced that the ADA "addresses substantial limitations on major life activities, not utter inabilities. . . . When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." Id. at 2206[6].

Because Petitioners fail to show any conflicts with Supreme Court or circuit court cases, or any other grounds for granting certiorari, Petitioners' writ should be denied.

"subconscious adjustments" which permit her to function normally. She has merely behaviorally adjusted her conduct and activities so as to lessen the impact of her disability as much as possible. Under no set of circumstances would her learning disability be controlled, or correctable, or go unnoticed due to "subconscious brain adjustments."

The case at bar is also distinguishable from Murphy, Sutton and Kirkingburg in that it alone of all circuit cases deals with learning disabilities, and it alone deals with accommodations on licensing exams. There are clearly no conflicts in the circuit courts on these matters as no circuit courts have dealt with them.

[6] Moreover, contrary to Petitioners' dire predictions of ills to befall society if the ADA and 504 disability definition is interpreted broadly, the Bragdon decision underscores that such an interpretation does not come at the expense of public accommodations, government entities or employers. These entities are not unduly exposed to liability since individuals who may be found to have disabilities under a broad definition must still be qualified for the job or other service. See, e.g., 42 U.S.C. §§ 12111(8), 12112(a). In addition, if accommodations are required, they must only be provided where they are reasonable in light of the costs and other burdens they impose. See, e.g., 42 U.S.C. §§ 12111(9), (10).

II. *The Second Circuit's Determination Regarding Compensatory Damages is Consistent with Supreme Court and Circuit Court Precedents*

By grossly mischaracterizing case law, Petitioners conclude that the Second Circuit "ignored the standards set forth in Guardians Association, Ferguson, and Gebser . . ." Pet. at 15. In fact, the Second Circuit's holding that Petitioners evinced intentional discrimination by acting with deliberate indifference to Dr. Bartlett, is in keeping with these cases and all Supreme Court and circuit court cases that have considered this issue.

As Petitioners themselves recognize, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq., was the model for Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, et seq. Pet. at 16 citing Canutillo Independent School District v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997). See also Grove City College v. Bell, 465 U.S. 555, 566 (1984). Section 504 references Title VI with respect to available relief, 29 U.S.C. § 794a(a)(2), and the ADA references Section 504 in this regard. 42 U.S.C. § 12133. Thus, the most recent relevant articulation by this Court of Section 504 and ADA damages standards was in Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). In Gebser, this Court held that compensatory damages are available in Title IX cases upon a showing of discriminatory intent as manifested by deliberate indifference. 118 S. Ct. at 1999 ("a damages remedy . . . under Title IX . . . [requires that] an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond. . . .

[T]he response must amount to deliberate indifference to discrimination.").

The Second Circuit's decision regarding compensatory damages is in perfect conformance with Gebser. The Second Circuit held that Dr. Bartlett had "met her burden of proving discriminatory intent" under the ADA and Section 504, Pet. App. at 19a, and held that the Board's policy regarding accommodating bar applicants with learning disabilities "constituted deliberate indifference to a strong likelihood of violating Dr. Bartlett's federally protected rights." Pet. App. at 20a (emphasis added)[7].

The circuit cases cited by Petitioners are also not in conflict with the Second Circuit's holding. Contrary to Petitioners' outright mischaracterizations, the courts in Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998), Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) and Carter v. Orleans Parish Public Schools, 725 F.2d 261 (5th Cir. 1984) all held that, under Section 504, compensatory damages are available upon a showing of discriminatory intent -- precisely what the Second

---

[7] Contrary to Petitioners' assertions, Gebser is not a departure from previous rulings of this Court regarding compensatory damages, and no "clarification" of a "conflict" is warranted. In Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74 (1992), this Court held that, in the context of Title IX cases, compensatory damages are available for an intentional violation. Pet. App at 19a. Similarly, this Court held in Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582 (1983), that compensatory damages in a Title VI action are available upon a showing of intentional discrimination, if not also for unintentional discrimination.

Circuit held[8]. The other Circuits which have ruled on this issue are likewise in agreement with the Second Circuit. See, e.g., Tyler v. City of Manhattan, 118 F.3d 1400, 1406 (10th Cir. 1997) (holding that compensatory damages are available under Title II of the ADA upon a showing of intentional discrimination and citing Oxford House-C. v. City of St. Louis, 843 F.Supp. 1556, 1577 (E.D. Mo. 1994) to the effect that intentional discrimination against persons with disabilities "'does not require personal animosity or ill will'"); Moreno v. Consolidated Rail Corp., 99 F.3d 782, 789 (6th Cir. 1996) (noting that every circuit that has reached the issue after Franklin has held that compensatory damages are available under Section 504); Pandazides v. Virginia Bd. of Education, 13 F.3d 823, 830 (4th Cir. 1994) (compensatory damages available under Section 504 for intentional discrimination, but no need to show discriminatory animus); J.L. v. Social Security Administration, 971 F.2d 260 (9th Cir. 1992) (same); Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103 (9th Cir. 1987) (same)[9].

---

[8] In fact, the Ninth Circuit in Ferguson cited approvingly to Gebser, 157 F.3d at 674. Moreover, even if the Ninth Circuit misinterpreted Supreme Court precedent, there is no reason to grant certiorari in this case where the Second Circuit correctly interpreted Supreme Court precedent.

[9] See also Alexander v. Choate, 469 U.S. 287, 295-297 (1985) ("[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus. . . . [M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.").

Petitioners' contention that the Second Circuit "disregarded the district court's findings of fact" regarding the awarding of compensatory damages, Pet. at 17, is both incorrect[10] and irrelevant to their Petition. The District Courts' finding of fact that the Board "intentionally withheld from plaintiff an accommodation to which this Court has deemed she was entitled," Pet. App. at 140a (emphasis in original), see also Pet. App. at 145a (same), was the basis of the District Court's holding that Petitioners intentionally violated the ADA and Section 504, and the basis for the Second Circuit's affirmance. Pet. App. at 20a[11]. Moreover, an appellate court's purported

---

[10] Petitioners seek to mislead this Court by arguing that the District Court found the views of Petitioners' expert, Dr. Vellutino, to be "perfectly rational." Pet. at 17. In fact, this view was expressed by the District Court in the context of its ruling on Dr. Bartlett's Equal Protection and 42 U.S.C. § 1983 claims, and referred to the Board members individually, not the Board as an entity. Petitioners conveniently ignore the District Court's finding in the context of Dr. Bartlett's ADA and Section 504 claims that Dr. Vellutino's views were "seriously infirm." Pet. App. at 59a, 60a.

[11] Contrary to Petitioners' claims, the District Court solidly backed up its holding of intentional discrimination, as did the Second Circuit in affirming that holding. The Board clearly had "actual knowledge of discrimination" and "fail[ed] adequately to respond" and thus met the Gebser deliberate indifference standard. As the Second Circuit held, the most obvious indication that Petitioners knew their actions were discriminatory yet failed to act is the fact that Petitioners used an untimed learning disabilities test (the Woodcock Word Attack and Word Identification subtests) to ascertain whether Dr. Bartlett had a disability, while the bar examination they administer is timed and Dr. Bartlett sought the accommodation of extra time. Pet. App. at 20a. In addition, the Second Circuit noted that, even in studies upon which Petitioners relied as support for their cutoff score on the Woodcock, one third of adults who have learning disabilities scored above the cutoff. Id. The Second Circuit thus held that the Woodcock tests were "unreliable" and that use of the tests "constituted deliberate indifference." Id. Citing directly to the District

errors in interpreting the district court's finding of facts is not an appropriate subject for Supreme Court review. Ross v. Moffitt, 417 U.S. 600, 616-617 (1974).

Court opinion, the Second Circuit noted that the court had found

> (a) the Woodcock could not measure Dr. Bartlett's lack of 'automaticity,' i.e., her ability to recognize a printed word and read it accurately and immediately without thinking; (b) the Woodcock was not timed and thus could not measure the slowness of reading – an important characteristic of adult dyslexics like Dr. Bartlett, who, on other tests, had demonstrated a reading rate comparable to the bottom fourth percentile of college freshman when timed; (c) the Woodcock was designed to principally assess children and did not have enough items in the difficult range; and (d) Dr. Bartlett's Woodcock results exhibited discrepancies, revealing high reading comprehension scores in comparison to low, but average, Word Attack and Word Identification scores. See id. at 1114. Furthermore, the district court found that use of a 30th percentile cutoff by Petitioners' expert, Dr. Frank Vellutino, was arbitrary and flawed because other studies demonstrated that one third of adults with dyslexia scored above that percentile on similar tests. See id.

Pet. App. at 6a-7a.

The record amply demonstrates that the Board was indeed aware of the myriad faults of their screening device for persons with learning disabilities:

• The District Court found that, after having been asked by the Board to develop a mechanism for their use which did not incorporate accepted clinical practice, Tr. at 2392, Dr. Vellutino informed Petitioners that the 30th percentile cutoff was arbitrary and, like any cutoff, inherently flawed. Pet App. at 55a, 126a-128a. See also, Pet. App. at 59a-61a. Moreover, Dr. Vellutino informed Petitioners that its use would lead to accommodating those without learning disabilities while denying accommodations to a

Because Petitioners fail to show any conflicts with Supreme Court or circuit court cases, or any other grounds for granting certiorari, Petitioners' writ should be denied.

III. *The Second Circuit's Determination Regarding the Applicability of Section 504 of the Rehabilitation Act is Consistent with Supreme Court and Circuit Court Precedents.*

The Second Circuit correctly held, consistent with Supreme Court precedent and the plain language of the statute,

---

number of individuals with learning disabilities. Tr. at 2395, 2401. Dr. Vellutino recommended to Petitioners in 1987 that they not utilize the Woodcock as a screening device because it was "pointless," Tr. at 1998, and because it could not determine who lacks automaticity. Tr. at 2305. He also informed Petitioners that permitting extended time to take the examination would not compromise Petitioners' purposes. Tr. at 2002. See also Pet. App. at 126a-128a. Both Dr. Vellutino and Petitioners acknowledged that the Woodcock was inconsistently applied because the review process was "catch as catch can," Tr. at 2223, 2044, and the "luck of the draw." Tr. at 2144. Thus, the District Court noted that "the best evidence of the Woodcock's shortcomings comes from defendants' experts and the scientific evidence upon which they rely." Pet. App. at 59a.

• Petitioners were aware that their approach to screening applicants was not used elsewhere. Pet. App. at 126a-128a; Tr. at 1882-3, 880-1.

• The unsuitability of the Woodcock was further brought to Petitioners attention in January 1992 when they were sued for discrimination against a person with learning disabilities. Rosenthal v. New York State Board of Law Examiners, 92 Civ. 1100 (S.D.N.Y. 1992). The U.S. Department of Justice submitted a strongly worded amicus brief in support of the plaintiff in Rosenthal, advising Petitioners that their method of assessing whether individuals had learning disabilities violated the ADA. Later that year, the Justice Department also commenced a formal investigation of the Board's policies regarding applicants with disabilities.

that Section 504 was applicable to the Board as the Board was a recipient of federal funds. Pet. App. 16a-18a.

Incredibly, Petitioners admit that federal Rehabilitation Act monies are given to them from other state agencies which pay for the exam fee of applicants with disabilities, Pet. at 23-24, but argue that, nonetheless, they are not a "recipient" of federal assistance for purposes of Section 504 applicability, and suggest that they are mere "beneficiaries" of federal monies. Pet. at 21-25.[12]

Section 504, which was amended in 1988, prohibits discrimination against persons with disabilities by "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The term "program or activity" is defined as:

> all of the operations of–
>
> > (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> >
> > (B) the entity of such State or local government that distributes such assistance

---

[12] Notably, Petitioners argued to the Second Circuit that they were not beneficiaries. Petitioners' Brief to the Second Circuit at 7-8. See also Pet. App. at 18a (the Second Circuit's response to Petitioners' argument regarding benefitting from the federal monies).

Unlike the airlines in U.S. Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) which did not actually receive any money and were thus found to be mere beneficiaries, there is no disputing that the Board actually received federal monies.

> and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a state or local government.

29 U.S.C. § 794(b) (emphasis added)[13].

Because Petitioners are a state entity, and because they have admitted that they receive federal money from two other state entities -- the New York State Department of Education, Office of Vocational and Educational Services for Individuals with Disabilities ("VESID") and the New York State Department of Social Services Commission for the Blind and Visually Handicapped ("CBVH") -- the Second Circuit correctly concluded, pursuant to the plain language of the statute, that the Board is a "department or agency" to which the federal "assistance" is "extended."

Moreover, the Second Circuit specifically applied that statute and U.S. Supreme Court precedent in recognizing that "[t]here is neither a requirement that a state entity directly receive federal financial assistance, see Grove City College v. Bell, 465 U.S. 555, 564, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984)[14], nor that it directly benefit from that assistance, see

---

[13] Similarly, regulations promulgated under Section 504 define a "recipient" as including "any instrumentality of a state . . . to which Federal financial assistance is extended directly or through another recipient." 34 C.F.R. § 104.3(f) (emphasis added).

[14] The VESID and CBVH funds which the Board receives are akin to the "indirect" federal financial aid which students in Grove City received. This Court held that receipt of such funds established a sufficient nexus to

Paralyzed Veterans, 477 U.S. at 607, 106 S.Ct. 2705 (citing Grove City)." Pet. App. at 17a (emphasis in original). In addition, the Second Circuit's conclusion regarding indirect receipt of funds is supported by at least three circuit courts, with no circuit courts opposing it. See Moreno v. Consolidated Rail Corp., 99 F.3d 782, 787 (6th Cir. 1996) (where entity received federal monies, albeit indirectly, it was a "recipient" of federal funds); Thomlison v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995) (same); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991) (quoting legislative history of Section 504 regarding indirect receipt of federal funds). Similarly, the Second Circuit's conclusion regarding benefitting from the federal assistance is shared by at least two circuits, with no circuits offering a contrary voice. See Bob Jones University v. Johnson, 396 F. Supp. 597, 603 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (ascertaining whether an entity has received federal assistance "does not depend . . . upon a showing that the university has reaped a financial gain. . ."); Moreno v. Consolidated Rail Corp., 99 F.3d at 787 (argument that entity was not a "recipient" since it "receives no benefit for which it does not reimburse the state" was "not . . . persuasive")[15].

---

consider the relevant part of Grove City College to be a recipient of federal funds, as this Court held that there was no difference between direct institutional assistance and indirect aid received by a school through its students. Id. at 564.

[15] In addition, the Fifth Circuit held that where an entity that receives federal money is not the ultimate beneficiary of the money, the entity is a "recipient" for Section 504 purposes. U.S. v. Baylor University Medical Center, 564 F. Supp. 1495 (D. Tx. 1983), aff'd, modified and vacated in part on other grounds, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985)(university that received federal Medicare and Medicaid money which was for the ultimate benefit of patients was a 504 "recipient"). The ultimate beneficiary of the federal monies the Board receives is similarly not

In addition, to the extent that such an analysis is still required after the 1988 amendments to Section 504[16], the Second Circuit decision is in conformance with the holding in Paralyzed Veterans that federal fund "recipient" status is based upon being "in a position to accept or reject . . . [the Section 504] obligations as a part of the decision whether or not to 'receive' federal funds." 477 U.S. at 606. The Second Circuit did not disturb the District Court finding that the State and the Board "could refuse the federal programs that require them to accept payment of an applicant's fee from the federal government." Pet. App. 71a[17].

It should also be noted that a determination by this Court of the applicability of Section 504 may not alter the outcome of the case, and if it does alter it, it would only be with respect to

---

the Board, but rather the bar exam applicants with disabilities.

[16] After analyzing the 1988 amendments, the Second Circuit noted that "[n]either the statute nor the regulations require an analysis of whether the instrumentality of a state to which the assistance is 'extended,' must also be in a position to accept or reject § 504 obligations for the strictures of the Rehabilitation Act to apply." Pet. App. at 18a.

[17] The facts of this case are radically different from those in National Collegiate Athletic Association v. Smith, __U.S.__, 1999 U.S. LEXIS 1511 (1999). This Court found that the National Collegiate Athletic Association ("NCAA"), a private organization, was not a recipient of federal funds, despite the fact that some of its members received federal funds, because it was not clear whether their dues were paid with federal funds. 1999 U.S. LEXIS 1511 at *17. The NCAA was thus found not to have received federal assistance but merely to have benefitted from the assistance. Id. The Board, on the other hand, is a state agency that receives money from two state agencies and that money is clearly designated as federal money. Pet. App. at 70a; Tr. 65, 82-3. The Board is thus in actual receipt of federal money, as opposed to merely benefitting from it.

the damages amount -- no more than $2,500, the damages awarded for one bar examination. Section 504 was concurrently applicable with the ADA for four out of the five administrations of the bar examination for which Petitioners refused to appropriately accommodate Dr. Bartlett, and the issue of compensatory damages for the one examination for which Section 504 alone is applicable was remanded to the District Court. Thus, even if this Court were to determine the issue of Section 504 applicability, Petitioners would continue to be held liable to Dr. Bartlett under the ADA.

As Petitioners have not demonstrated that there is any conflict between the Second Circuit's decision and this Court's precedents, and have not demonstrated any other ground for granting certiorari, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAW OFFICE OF JO ANNE SIMON
356 Fulton Street, 3rd Floor
Brooklyn, New York 11201
(718) 852-3528
BY: JO ANNE SIMON*

NEW YORK LAWYERS FOR
THE PUBLIC INTEREST, INC.
30 West 21st Street, 9th Fl.
New York, New York 10010
(212) 727-2270
BY: RUTH LOWENKRON

* Counsel of Record

Counsel gratefully acknowledge the assistance of John A. Gresham, Senior Litigation Associate at New York Lawyers for the Public Interest, Inc.

March 12, 1999